

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

CLYDE RAY SPENCER,

Plaintiff,

v.

JAMES M. PETERS, et al.,

Defendants.

CASE NO. C11-5424 BHS

ORDER DENYING MOTION TO
STRIKE EXPERT REPORT AND
BAR TESTIMONY

This matter comes before the Court on a motion to strike Rule 26(a)(2) reports of Rebecca Roe ("Roe") and Patti Toth ("Toth") and to bar testimony (Dkt. 106) filed by Plaintiff Clyde Ray Spencer. The Court has considered the pleadings filed in support of and in opposition to the motion and the remainder of the file and hereby denies the motion for the reasons stated herein.

I. PROCEDURAL & FACTUAL BACKGROUND

This case arises out of the alleged wrongful arrest and prosecution of Spencer. Among the causes of action pending in this matter are 42 U.S.C. § 1983 claims for malicious prosecution, fabrication of evidence, deliberate withholding of exculpatory evidence, conspiracy, false arrest and false imprisonment.

1 On November 16, 2012, Spencer filed a motion to strike Fed. R. Civ. P. 26(a)(2)
2 reports of Roe and Toth and to bar their testimony. Dkt. 106. On December 3, 2012,
3 Defendant James Peters (“Peters”), former Clark County Prosecutor, filed a response
4 brief. Dkt. 118. On December 7, 2012, Spencer filed a reply brief. Dkt. 120.

5 The instant motion involves a dispute over the expert testimony of Roe, who was a
6 supervising Senior Deputy Prosecuting Attorney in the King County Special Assault Unit
7 during the period when Spencer was investigated and prosecuted. Dkt. 119-1 at 4. Peters
8 has indicated he does not intend to offer the opinions of Toth, as those would be
9 duplicative of Roe’s testimony. Dkt. 118 at 1. Therefore, the Court will not address
10 Spencer’s arguments asking the Court to strike and bar the testimony Toth.

11 II. DISCUSSION

12 Spencer argues that the Court should strike the expert report of Roe and bar her
13 testimony as to (1) whether probable cause existed because it is an ultimate issue of law
14 and therefore inadmissible, (2) the child interview techniques used during the period
15 Spencer was under investigation, including Roe’s testimony that criticizes the report of
16 Spencer’s expert, Dr. William Bernet (“Dr. Bernet”). *See* Dkt. 106.

17 Peters argues Roe is not precluded from testifying as to the ultimate issue of
18 whether prosecutor Peters knew or should have known that the information which formed
19 the basis of Spencer’s prosecution was fabricated. Dkt. 118 at 11. Peters argues that the
20 fact that Roe’s opinion embraces an ultimate issue does not make her opinion
21 inadmissible under Fed. R. Evid. 704. Peters observes that Spencer himself has, in
22 numerous pleadings, including the complaint, characterized Roe as an expert in sex

1 crimes investigations and prosecutions. Dkt. 118 at 3-4 (*citing, e.g.*, Dkt. 1 at 13).

2 Additionally, Peters argues that based on her years of experience Roe could qualify as an
3 expert under Fed. R. Evid. 702, and it is permissible for her to testify regarding the
4 interview techniques at issue. *Id.* at 9.

5 **A. Standards for Expert Qualification & Testimony**

6 Under Fed. R. Evid. 702, expert testimony should be admitted only if it “will assist
7 the trier of fact to understand the evidence or to determine a fact in issue. Fed. R. Evid.
8 702. To qualify as an expert, a witness must have “knowledge, skill experience, training
9 or education” pertinent to such evidence or fact in issue. Fed. R. Evid. 702 .

10 The trial court’s gatekeeping function requires the court to assess whether the evidence is
11 relevant and reliable. *Kennedy v. Collagen Corp.*, 161 F.3d 1226, 1228 (9th Cir. 1998).

12 Federal courts typically use the *Daubert* factors as a part of their gatekeeping function.

13 *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593-594 (1993). The

14 *Daubert* factors are (a) whether the theory or technique can and has been tested; (b)

15 whether the theory or technique has been subjected to peer review and publication; (c) the

16 known or potential rate of error for the technique; and (d) the theory or technique's

17 general degree of acceptance in the relevant scientific community. *Daubert*, 509 U.S. at

18 593-594. However, the Fed. R. Evid. 702 inquiry under *Daubert* is a “flexible one” and

19 “the factors identified in *Daubert* may or may not be pertinent in assessing reliability,

20 depending on the nature of the issue, the particular expertise, and the subject of his

21 testimony.” *White v. Ford Motor Co.*, 312 F.3d 998, 1007 (9th Cir. 2002). The *Daubert*

22 factors were not intended to be exhaustive nor apply in every case. *Kumho Tire Co., Ltd.*

1 *v. Carmichael*, 526 U.S. 137, 147-48 (1999). In this case, the Court does not find these
2 factors particularly helpful in determining the relevance and reliability of Roe's opinions.

3 Expert opinion testimony is deemed sufficiently reliable if the expert has "good
4 grounds" for the testimony, that is, if the expert's conclusions are based on the
5 knowledge and experience of his or her discipline rather than on "subjective belief or
6 unsupported speculation." *Kumho Tire Co., Ltd.*, 526 U.S. at 147-48. Fed. R. Evid. 702
7 permits expert testimony comparing conduct of parties to the industry standard. *Vucinich*
8 *v. Paine, Webber, Jackson & Curtis, Inc.*, 803 F.2d 454, 461 (9th Cir.1986).

9 Under Fed. R. Evid. 704(a), an expert opinion "is not objectionable just because it
10 embraces an ultimate issue." *See also Larez v. City of Los Angeles*, 946 F.2d 630, 635
11 (9th Cir. 1991) (as amended) (finding that testimony of "an expert on proper police
12 procedures and policies" was relevant and admissible); *Davis v. Mason County*, 927 F.2d
13 1473, 1484-85 (9th Cir.1991) (as amended) (testimony of plaintiffs' police practices
14 expert that officers violated law enforcement standards properly received). The Ninth
15 Circuit has held that "[a]n ultimate issue opinion by a properly qualified expert should
16 not be excluded except in the extreme case where the expert's opinion is inherently
17 misleading or unfairly prejudicial." *Kinsey*, 843 F.2d at 389.

18 **B. Interview Techniques**

19 Spencer argues that Roe has not established the requisite level of expertise
20 to challenge the opinions offered by their expert Dr. Bernet regarding interview
21 techniques used on possible child abuse victims. Dr. Bernet is board certified in
22 psychiatry, child psychiatry and forensic psychiatry and has researched and authored

1 publications related to interview techniques of possible child abuse victims. Dkt. 106 at 5.
2 Spencer contends that under Fed. R. Evid. 702, Roe is not qualified to provide opinions
3 which bear on the interviewing techniques used in Spencer's criminal case. *Id.* at 6-7.
4 He argues in large part that Roe did not specialize in forensic interviews; she did not
5 conduct any independent research regarding proper interview protocols or techniques; nor
6 does she have any special training or education that she received regarding proper
7 interviewing techniques; and her experience prosecuting allegations of sexual abuse is
8 not enough. *Id.* at 6-8.

9 Peters argues that based on her experience and knowledge, Roe qualifies as an
10 expert who can evaluate statements from witnesses to make charging decisions or to
11 prepare the testimony of the witness. Dkt. 118 at 8-9. Under Fed. R. Evid. 702, Peters
12 contends that Roe is qualified for the following reasons: for 17 years she served as a
13 prosecutor, most of that time was spent heading a unit that prosecuted all sex crimes in
14 the largest county in the state; she reviewed of hundreds of police reports in order to
15 make charging decisions; she has personally interviewed hundreds of child victims as
16 well as personally prosecuted hundreds of sex abuse cases; she has participated as a
17 speaker in trainings for deputy prosecutors and law enforcement officers concerning
18 sexual abuse cases; she has been a contributing author to several publications related to
19 the investigation and prosecution of child sexual abuse cases; she has co-authored a
20 lengthy chapter on techniques for interviewing child victims; and she was a member of
21 national advisory boards for the prosecution of child sex abuse cases as well as other
22 similar organizations. *Id.* at 9 -10 (citing 119-1-5). Given her experience, Peters argues

1 that Roe is qualified to opine as to whether or not Clark County prosecutors, Peters in
2 particular, maliciously pursued criminal charges based upon information that they knew
3 or should have known was fabricated, particularly the information gathered by Detective
4 Krause from the alleged child victims. *Id.* at 9-10. That Roe is not an academic, Peters
5 contends, does not disqualify her as an expert on matters related to the prosecution of
6 cases which involve child sexual abuse. *Id.* at 9.

7 In Roe's expert report, she provides her opinion on the standard of practice during
8 child interviews in December 1984. Dkt. 106 at 7. She opines, in part, that in the Peters
9 interview with Katherine nothing was "so coercive or abuse that it would lead a
10 reasonable prosecutor to know that the techniques used would yield false information,"
11 "given the standard of practice in December 1984." Dkt. 107 at 14. Upon review of
12 Roe's qualifications, namely of her experience and knowledge as discussed by Peters in
13 his opposition brief (*see supra.*), this Court is likely to deem Roe's opinions regarding the
14 standard of practice for interview techniques during 1984 and 1985 reliable and relevant.

15 There are other opinions in Roe's report about which Spencer contends that she is
16 either not qualified to testify to or her opinions are simply based on "subjective belief or
17 unsupported speculation." Dkt. 106 at 6. Roe's opinions involve whether a reasonable
18 prosecutor would have a basis to believe that information set forth in the reports of law
19 enforcement at that time were fabricated. *Id.* These reports include those provided by
20 Detective Krause and involve the investigatory interviews of Kathryn and Matthew
21 Hansen. *Id.* As a 17-year prosecutor, whose experience and knowledge of the
22 prosecution of sexual abuse cases is well-established by her credentials (*see* Dkt. 119 -1-

5), which include, but are not limited to, years spent evaluating written police reports containing child witness interviews and making charging decisions based on that information, the Court finds Roe's opinions are not simply based on subjective belief or unsupported speculation, as Spencer asserts. Rather, Roe's opinions appear to be grounded in her knowledge and experience. The Court is, therefore, likely to qualify her as an expert who can testify to these matters. Further, that Roe is not a psychologist or psychiatrist, as is Spencer's expert, Dr. Bernet, goes to the weight given to Roe's opinions, not to their admissibility. If Roe is qualified as an expert, Spencer is free to rigorously cross-examine her as to her opinions characterizing or criticizing Dr. Bernet's report, or any other matters, as well as the bases thereof.

C. Probable Cause

Spencer argues that probable cause is an ultimate legal conclusion, and Roe is prohibited from opining on that. Spencer contends that although expert testimony is not objectionable simply because it embraces an ultimate issue, "an expert witness cannot give an opinion as to her legal conclusion, i.e. an opinion on an ultimate issue of law." Dkt. 106 at 3-4 (*citing Mukhtar v. California State University, Hayward*, 299 F.3d 1053, n. 10 (9th Cir. 2002)). According to Spencer, such an opinion would not aid the jury, but would attempt to substitute the expert's judgment for that of the jury's. *Id.* (*citing United States v. Duncan*, 42 F.3d 97, 101 (2nd Cir. 1994)). Additionally, in Spencer's reply brief, he indicates that any arguments essentially based on what the standard of practice is for prosecutors should be rejected in part because Peters is being sued for his role in the investigation, not the prosecution. Dkt. 120 at 2.

1 Peters argues that in order to prevail on a malicious prosecution claim, a
2 plaintiff must prove that he acted with malice in conspiracy with other defendants by
3 initiating or continuing a prosecution based on evidence he knew or had reason to believe
4 was fabricated. Dkt. 118 at 11 (*citing McCarty v. Barrett*, 804 F. Supp. 2d 1126, 1147
5 (W.D. Wa. 2011)). Peters argues that “this turns on whether reviewing the reports of
6 Detective Krause [sic] [and] other law enforcement officers defendant Peters knew or
7 should have known the allegations contained in those reports were fabricated but
8 nonetheless proceeded with the prosecution of the plaintiff.” *Id.* Peters contends Roe is
9 uniquely qualified to provide expert testimony regarding the conduct of Spencer’s
10 prosecution, as she has reviewed hundreds of police reports in order to make charging
11 decisions. *Id.* According to Peters, that her opinions go to ultimate issues in the case
12 does not make Roe’s opinions inadmissible under Fed. R. Evid. 704, which permits the
13 admission of testimony on ultimate issues in the case. *Id.* at 11-12 (*citing United States*
14 *v. Kinsey*, 843 F.2d 383, 389 (9th Cir. 1988), *reversed on other grounds, United States v.*
15 *Norby*, 225 F.3d 1053 (9th Cir. 2000)).

16 The Court finds that it will likely qualify Roe as an expert under Fed. R. Evid. 702
17 and permit her to testify to her December 1984 evaluation of Spencer’s case because it
18 appears that she has the knowledge and background to do so. Similar to the reasons
19 articulated above with respect to Roe’s expertise related to interview techniques, the
20 Court finds that Roe’s experience reviewing hundreds of child abuse reports generated by
21 law enforcement officers each year, making charging decisions in those cases, and her
22 personal prosecution of child sex abuse cases as well as the knowledge gained therefrom

1 will likely qualify Roe to testify about her recommendations regarding the filing of
2 charges against Spencer. Those recommendations involve the opinion she provided to
3 the Clark County Prosecutor's Office in 1984 based on her review of the evidence against
4 Spencer before he was initially charged.

5 While Spencer disputes that the foregoing is "expert" testimony (Dkt. 120 at 2-3),
6 Roe's 1984 recommendations and her opinions about those recommendations ultimately
7 go to her expertise in the area of child sex abuse cases. Spencer may attempt to call Roe
8 to testify as to her opinion regarding whether or not to file charges; he may utilize her
9 1984 recommendation or current expert report; or he may call his own expert to testify
10 about such issues. If he does, assuming a proper foundation is laid with regard to Roe's
11 qualifications, which is consistent with that submitted in connection with the present
12 motion, Peters will be allowed to fully explore what Roe's opinion would be were the
13 later discovered evidence against Spencer known to her.

14 While the Court will not allow Roe to testify to an ultimate legal conclusion, the
15 Court realizes her opinions may "embrace" "ultimate issues" in this case, such as the
16 considerations made by law enforcement officers in determining the existence of
17 probable cause. *See* Fed. R. Evid. 704(a) (an expert opinion is not objectionable just
18 because it embraces an ultimate issue). As discussed above, assuming Roe is qualified to
19 testify as an expert, the Court will likely find that such testimony will not mislead the
20 jury or be unfairly prejudicial to Spencer. Again, assuming Roe is qualified as an expert,
21 the Court will likely not prohibit her from explaining the role of the prosecutor in a
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1 criminal case such as Spencer's, so long as that testimony otherwise meets within the
2 requirements of the Federal Rules of Evidence.

3 The Court denies Spencer's motion to strike Roe's report and bar her testimony on
4 the aforementioned issues. However, before Roe will be allowed to testify, the Court
5 may hold a hearing, outside the presence of the jury, in order to perform its gatekeeping
6 function under *Daubert*.

7 **III. ORDER**

8 Therefore, it is hereby **ORDERED** that Spencer's motion to strike the report and
9 bar testimony of Roe (Dkt. 106) is **DENIED**.

10 Dated this 4th day of January, 2013.

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13 BENJAMIN H. SETTLE
14 United States District Judge
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